

Decisions of Interest

JUNE 12, 2023

CRIMINAL

THIRD DEPARTMENT

People v Nellis | June 9, 2023

PROSECUTORIAL MISCONDUCT | *SANDOVAL/MOLINEUX* | REVERSED

The defendant appealed from a Fulton County Court judgment convicting him of 2nd degree murder, 1st degree CPW, and 3rd degree CPW (two counts). The Third Department reversed based on multiple instances of prosecutorial misconduct. The victim was shot in the head at close range. The People elicited testimony from three witnesses about the defendant's prior bad act of shooting someone off a motorcycle, which was not included in their *Sandoval/Molineux* proffer. The People also cross-examined the defendant about the underlying facts of his decade-old 2nd degree reckless endangerment conviction, where he shot a rifle at someone; the motorcycle incident; and his statement in a jail call that, if he caught whoever urinated in his bed, he would stab him in the neck with a pencil. Finally, the People made multiple improper comments during summation. They did not merely attempt to impeach the defendant's credibility, they tried to create the impression that he had a violent propensity when angered. The prosecutor's misconduct was compounded by the repeated presentation of bad act evidence, the court's failure to intervene, and the absence of proof at trial of motive. Steven M. Sharp represented the appellant.

[People v Nellis \(2023 NY Slip Op 03046\)](#)

FOURTH DEPARTMENT

People v Hu Sin | June 9, 2023

MOLINEUX | UNCHARGED ACTS OF SEX ABUSE | DISSENT

The defendant appealed from an Erie County Court judgment convicting him of 1st degree rape, 1st degree sexual abuse, and 3rd degree rape. The Fourth Department affirmed. One justice dissented. The defendant slammed his sister-in-law's head into a wall and forced himself upon her after she refused his sexual advance. The court permitted testimony about the defendant's prior uncharged acts of abuse against the complainant's sisters. In the dissent's view, the prejudicial value of this testimony outweighed its probative value; it was neither relevant to a specific material issue nor necessary to complete the narrative or provide background information. Although the involved parties "share a specific ethnic background whose culture is perceived to afford men significant power and respect," the challenged testimony was nothing more than evidence of the

defendant's propensity to commit sex crimes. It was not indicative of a common scheme or plan, it simply demonstrated "a repetitive pattern."

[People v Hu Sin \(2023 NY Slip Op 03166\)](#)

People v Morrison | June 9, 2023

SENTENCE REDUCTION | INTEREST OF JUSTICE

The defendant appealed from an Erie County Supreme Court judgment convicting him of 2nd degree CPW and sentencing him to 3 ½ years plus 3 years of PRS, based on his guilty plea. The Fourth Department invoked its interest of justice jurisdiction and reduced the PRS term to 2½ years. Supreme Court stated that, as part of the plea agreement, it would impose a 2½-year term of PRS. At sentencing, it imposed a 3-year term of PRS, departing from the express terms of the plea agreement, despite acknowledging there had been no material change since the plea. The Legal Aid Bureau of Buffalo, Inc. (Susan R. Hutchinson, of counsel) represented the appellant.

[People v Morrison \(2023 NY Slip Op 03145\)](#)

People v McKoy | June 9, 2023

CONSECUTIVE SENTENCES | ILLEGAL | NOT SEPARATE ACTS

The defendant appealed from an Ontario County Supreme Court judgment convicting him of 2nd degree murder and 2nd degree CPW after a jury trial. The Fourth Department modified by running the sentences concurrently. The People failed to present evidence that the defendant's possession of the loaded firearm on the date of the offense was separate and distinct from the act of shooting the victim. Cambareri & Brenneck (Melissa K. Swartz, of counsel) represented the appellant.

[People v McKoy \(2023 NY Slip Op 03119\)](#)

People v Amin | June 9, 2023

DETERMINATE SENTENCE | NOT MANDATORY

The defendant appealed from an Erie County Supreme Court judgment convicting him of 1st degree sexual abuse based on his guilty plea. The Fourth Department vacated the sentence and remanded. Supreme Court failed to apprehend the extent of its sentencing discretion. The court indicated that a showing of mitigating circumstances was required before it could impose a sentence other than a determinate term of imprisonment. However, a determinate sentence was not mandatory except in circumstances absent here. The issue would survive even a valid waiver of appeal and does not require preservation. Teodoro Siguenza represented the appellant.

[People v Amin \(2023 NY Slip Op 03093\)](#)

People v Shea'Honnie D. | June 9, 2023

SENTENCE REDUCED | CPL 440.47 APPEAL MOOT

The defendant separately appealed from an Onondaga County Court judgment convicting her of 1st degree attempted robbery based on her guilty plea, and from an order denying her CPL 440.47 resentencing motion. The Fourth Department reduced the sentence and dismissed the CPL 440.47 appeal as moot. The defendant's coram nobis motion had been granted based on appellate counsel's failure to challenge her sentence as harsh and excessive. In her de novo appeal, the Fourth Department found her waiver of appeal

invalid and the sentence harsh and excessive. Her appeal from the denial of her CPL 440.47 application was dismissed as moot because she already served the entire reduced prison term, and the PRS component had been reduced to the legal minimum. Cambareri & Brenneck (Melissa K. Swartz, of counsel) represented the appellant in her direct appeal. Cravath, Swaine & Moore, LLP (Andrew Wiktor, of counsel) represented the appellant in her CPL 440.47 appeal.

[People v Shea'Honnie D. \(2023 NY Slip Op 03137\)](#)

[People v Shea'Honnie D. \(2023 NY Slip Op 03138\)](#)

People v Spellicy | June 9, 2023

RIGHT TO SELF REPRESENTATION | AFFIRMED

The defendant appealed from an Onondaga County Supreme Court judgment convicting him of 3rd degree burglary, possession of burglar's tools, and attempted petit larceny. The Fourth Department affirmed. The defendant argued that his constitutional right to self-representation was violated because the court granted his request to proceed pro se only six days before trial, leaving him unable to properly prepare. Because the defendant's challenge was to the timing and manner of the court's decision—rather than his right to self-representation—it was subject to harmless error review. Regardless of whether the court erred, it was harmless under the circumstances.

[People v Spellicy \(2023 NY Slip Op 03099\)](#)

TRIAL COURT

People v Brown | 2023 WL 3911883

710.30 NOTICE WITHDRAWN | IN-COURT ID PRECLUDED

Queens County Supreme Court granted the People's reargument motion but adhered to its decision precluding the complainant from making an in-court identification (ID). Before a scheduled *Dunaway/Wade* hearing, the People withdrew their CPL 710.30 notice of two ID procedures. The court advised that withdrawal may result in preclusion of the IDs at trial. A hearing was held as to a third ID procedure. The court denied suppression of that ID but precluded the complainant's in-court ID based on the two procedures described in the withdrawn notice. The People later sought permission to have the complainant identify the defendant in court, and to introduce video surveillance at trial that was used in an ID procedure with the complainant. After reviewing the videos, the court denied the motion. The complainant's ID of the defendant while viewing a video of the defendant at a time other than that of the offense constituted an ID procedure requiring CPL 710.30 notice. The Legal Aid Society of NYC (Jessica Bettencourt, of counsel) represented the defendant.

[People v Brown \(2023 NY Slip Op 50555\[U\]\)](#)

FAMILY

THIRD DEPARTMENT

Matter of Amber GG. v Eric HH. | June 8, 2023

RELOCATION DENIAL | REVERSED

The mother appealed from a Broome County Family Court order denying her modification/relocation petition after a hearing. The Third Department reversed, granted the petition, and remitted for a *Lincoln* hearing with the older child regarding parenting time. Family Court's determination was not supported by a sound and substantial basis in the record. The mother had greater family support, available housing, and better job prospects in Florida. The father maintained a relationship with the children and saw them on alternative weekends, but he rarely sought out additional parenting time and had extremely limited knowledge about the children's education, activities, and medical care. The proof showed that the mother was by far the more involved parent and primary caregiver, the lives of the children would be enhanced by the relocation, the children wanted to move, and the mother was willing to facilitate significant visitation with the father. Lisa K. Miller represented the mother.

[Matter of Amber GG. v Eric HH. \(2023 NY Slip Op 03059\)](#)

Matter of Samantha WW. v Malek XX. | June 8, 2023

LINCOLN HEARING REQUIRED | REVERSED

The mother appealed from a Columbia County Family Court order granting the father's motion to dismiss her modification/relocation petition at the close of her proof. The AFC opposed the motion and asked Family Court to conduct a *Lincoln* hearing. The court abused its discretion in declining to hold a *Lincoln* hearing, stating that it presumed the child preferred to reside with the mother in Florida. The wishes of the soon-to-be 16-year-old child, although not determinative, should have been considered, including any insight into his relationship with each parent. Lindsay H. Kaplan represented the mother.

[Matter of Samantha WW. v Malek XX. \(2023 NY Slip Op 03052\)](#)

Matter of Awawdeh v Awawdeh. | June 8, 2023

ONE FAMILY-ONE JUDGE RULE | VENUE CHANGE NOT REQUIRED

The respondent appealed from a Washington County Family Court order granting the petitioner's family offense petition and issuing an order of protection. The Third Department affirmed. The petitioner commenced this family offense proceeding in Washington County while the parties' divorce proceeding was pending in Saratoga County. The respondent argued that the petition should have been dismissed with leave to refile in Saratoga County under the one family-one judge rule (see 22 NYCRR 205.3 [c] [6]). But this rule speaks to the assignment of cases within a court, not whether venue of a proceeding is proper, and it only applies to the extent feasible and appropriate. The respondent further argued that the allegations were too remote in time. However, a family offense proceeding is subject neither to a statute of limitations nor a defense of laches.

[Matter of Awawdeh v Awawdeh \(2023 NY Slip Op 03062\)](#)

Matter of Amari F. (Haley F.) | June 8, 2023

MOOT | ADOPTION NOT STAYED | DISMISSED

The mother appealed from an Albany County Family Court order granting the petitioner's permanent neglect and TPR petition. The Third Department dismissed the appeal as moot. Family Court found the mother to have permanently neglected the children based on her admissions and, after a dispositional hearing, terminated her parental rights. During the pendency of the appeal, the child was adopted by her foster family of 10 years. Although adoption does not render moot a challenge to the finding of permanent neglect, the mother took no issue with the underlying finding, and it does render moot the court's disposition in Social Services Law § 384-b proceedings. The exception to the mootness doctrine does not apply. Although the arguments presented are likely to recur, they are not likely to evade review, as they could be preserved by a stay of the adoption proceedings.

[Matter of Amari F. \(Haley F.\) \(2023 NY Slip Op 03047\)](#)

CIVIL

SUPREME COURT

Matter of Oustatcher v Clark | 2023 WL 3872656

FOIL DENIAL | DA MISCONDUCT | AFFIRMED

The petitioner appealed from a judgment of Bronx County Supreme Court which denied his FOIL request and dismissed his CPLR article 78 proceeding. The First Department affirmed, finding that the request for records as to attorney misconduct failed to describe the documents with sufficient specificity. [NOTE: In an article about the decision, the NYLJ reported that the petitioner was a defense attorney who had been a career prosecutor at the Bronx DA's office. The petitioner asserted that the DA's office had lost or destroyed much of the case file in a murder case in which a post-conviction motion was pending—consistent with a broad illicit practice of file destruction.]

[Matter of Oustatcher v Clark \(2023 NY Slip Op 03075\)](#)

<https://www.law.com/newyorklawjournal/2023/06/08/ny-appeals-court-rejects-ex-bronx-prosecutor-turned-defense-lawyers-effort-to-compel-foil-info-on-bronx-adam-alleged-misconduct/>

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